(3)

FILED

JUN 16 1993

No. 92-1825

OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

M.K. PETERSON,

Petitioner,

v.

RAUSCHER PIERCE REFSNES, INC., AND RICHARD F. JUBA,

Respondents.

BRIEF IN OPPOSITION

MARVIN S. SLOMAN
Counsel of Record for Respondents
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201
214/855-3000
Telecopier: 214/855-1333

Of Counsel:
BRUCE W. COLLINS
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201
214/855-3000
Telecopier: 214/855-1333

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an arbitration award should be vacated when, after reviewing the record of the arbitration, the district and appellate courts have determined that the record fails to substantiate petitioner's contentions that the award should be vacated based on alleged evident partiality of the arbitrators, alleged denial of due process, alleged manifest disregard of the law by the arbitrators, and alleged procedural irregularities.

LIST OF AFFILIATED CORPORATIONS

Pursuant to Rule 29.1 Respondent Rauscher Pierce Refsnes, Inc. provides the following list of affiliated corporations:

Inter-Regional Financial Group, Inc.
Dain Bosworth Incorporated
Insight Investment Management, Inc.
Dain Corporation
IFG Information Services, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Affiliated Corporations	ii
Table of Authorities	iv
Statement of the Case	1
Argument	7
The Court of Appeals Correctly Refused To Vacate The Arbitration Award Based On Factual Findings That Do Not Present Issues of Law Appropriate For Review By This Court	7
Conclusion	13

TABLE OF AUTHORITIES

Cases

	Page
Avis Rental Car System, Inc. v. Garage Employees Union, 791 F.2d 22 (5th Cir. 1986)	10
Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968)	8
Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017 (5th Cir. 1990)	5
Fort Hill Builders, Inc. v. National Grange Mutual Insurance Co., 866 F.2d 11 (1st Cir. 1989)	8
Intercontinental Industries Inc. v. American Stock Exchange, 452 F.2d 935 (5th Cir. 1971), *cert. denied,* 409 U.S. 842 (1972)	11
Szuts v. Dean Witter Reynolds, Inc., 931 F.2d 830 (11th Cir. 1991)	10
United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987)	11, 12
Wilko v. Swan, 346 U.S. 427 (1953)	9

Constitution and Statutes

U.S. Const. amend. XIV	9
9 U.S.C.	
§ 10(b)	4, 7
§ 10(c)	4, 7, 11
§ 10-11	5

Page

Other Authorities

Local Rule of the United States Court of Appeals for the Fifth Circuit 47.5 4

NYSE Rule 609 10

NYSE Rule 611 10

United States General Accounting Office, *Securities Arbitration: How Investors Fare* (May 11, 1992) 2

No. 92-1825

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

M.K. PETERSON,

Petitioner,

v.

RAUSCHER PIERCE REFSNES, INC., AND
RICHARD F. JUBA,

Respondents.

BRIEF IN OPPOSITION

Respondents respectfully pray that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

The petitioner commenced an arbitration before the New York Stock Exchange, Inc. ("NYSE") in November 1987 to recover losses in his securities account with respondent Rauscher Pierce Refsnes, Inc. arising from the October 19, 1987, stock market crash, and agreed to abide by the arbitration rules published by the NYSE. Collins Ex. C; Arb. Pl. The arbitration began on August 23, 1988, and since that date petitioner has waged a protracted and unsuccessful campaign against the arbitration itself. On the first day of the hearing, the five-member panel appointed by the NYSE — experienced arbitrators with impressive credentials and no financial or social ties to the parties — actively engaged petitioner's first witness, a securities expert, in

lively and respectful questioning. 2SR 38-48; 4R 62-240. After it became apparent that the panel would not accept uncritically the evidence tendered by him, petitioner determined to replace the panel with more sympathetic arbitrators. Petitioner's hostility to the process was compounded by a pre-existing bias against arbitration. Petitioner told the arbitrators at the outset of the second day of hearings that he had "an armload of clippings that says that under arbitration, the claimant usually is working against a stacked deck." 5R 336.[1] Petitioner ignored the panel's repeated efforts to disabuse him of his jaundiced view of the proceeding, 5R 332, 344-46, 358-59, and embarked on a campaign in the courts and in the arbitration to obstruct the hearing and replace the arbitrators, 2SR 58-59, 73-74, 83-88, 98-152; 11R 1708-17; Collins Ex. I. The arbitration nevertheless proceeded to a conclusion in March 1991, after 21 days of hearings spread over three and one-half years, when the panel unanimously rendered an award in respondents' favor. Arb. Pl., Award.

Although petitioner's efforts to enjoin the proceeding in court delayed the arbitration for nearly a year after the initial hearings, he began to complain to the panel and to the NYSE that the arbitration was taking too long after hearings resumed in mid-1989. 2SR 58-59, 73-74, 77-80, 83-88.

---

[1] Whatever these undisclosed clippings may have indicated, NYSE arbitration is not stacked against the claimant. The United States General Accounting Office recently completed a two-year study comparing results in securities arbitrations before the self-regulatory organizations in the securities industry, including the New York Stock Exchange and the National Association of Securities Dealers, with results in securities arbitrations before the American Arbitration Association, an organization not affiliated with the securities industry. The GAO concluded that statistical evidence "showed no indication of a pro-industry bias in decisions at industry sponsored forums." United States General Accounting Office, *Securities Arbitration: How Investors Fare* at 6 (May 11, 1992).

At the same time, petitioner resisted efforts to expedite the arbitration. *See, e.g.,* 11R 1716-17 (petitioner "rejected out of hand" as a "loony-tunes" idea respondents' suggestion to expedite the hearing by videotaping sessions if one or two arbitrators could not be present). When two arbitrators voluntarily withdrew in mid-1990, petitioner insisted at the outset of three hearing days set in July 1990 that the arbitration start over again. Petitioner also used peremptory challenges to try to prevent the NYSE from finding replacements from the exhausted pool of arbitrators available to serve on the panel. 2SR 197-201; 13R 2267, 2311-18. After much argument, petitioner agreed that the hearing could go forward with the two replacement arbitrators and the three original panel members after the two principal witnesses, petitioner and the respondent broker, had repeated the major substance of their testimony in narrative form, together with brief additional direct and cross-examinations. 14R 2348-2493. The replacement arbitrators received transcripts of the hearings pre-dating their appointment, and had an opportunity to review them before hearings in following months. 2SR 205-08. The replacement panelists also had an opportunity to observe live testimony from the only other witnesses, in addition to petitioner and the respondent broker, who had testified before their appointment because petitioner recalled the witnesses — two securities experts — to repeat and supplement their testimony. 18R 3606-3708; 19R 3800-3938.

The arbitrators' award was based on an exhaustive record, including 5,422 pages of hearing transcripts, 204 exhibits, extensive pleadings and post-hearing briefing, and lengthy opening and closing arguments. Petitioner's case-in-chief took up 4,279 pages of the transcript and 18 of the 21 days of hearing.

Upon receipt of the adverse award, petitioner moved in the district court to vacate the award under Section 10(b) and (c) of the Federal Arbitration Act, 9 U.S.C. § 10(b) and (c); under the "manifest disregard for the law" doctrine; for alleged violation of due process; and on the ground that petitioner had not agreed to arbitrate the dispute. The district court rejected petitioner's arguments and confirmed the arbitration award in March 1992. The court was "convinced after thorough review of the record that [petitioner] has failed to show that the arbitration proceedings were fundamentally unfair." Order, p. 2.

Petitioner appealed the denial of his motion to vacate the award to the United States Court of Appeals for the Fifth Circuit, abandoning his contention that he had not agreed to arbitrate the dispute and re-urging the remaining grounds rejected by the district court. After conducting a *de novo* review of the record, the court of appeals affirmed the district court's order in an unpublished opinion delivered in January 1993. The court concluded that petitioner had not sustained his burden of demonstrating fundamental unfairness in the arbitration proceeding, and did not expressly address any discrete issues of law in its opinion. In deciding not to publish the opinion, the court of appeals specifically referred to Local Rule of the United States Court of Appeals for the Fifth Circuit 47.5, which provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Opinion, App. 2A.[2] The court also recognized that numerous incidents relied on by petitioner to set aside the award were attributable to provocations by petitioner and his counsel, observing "that the

---

[2] Appendix references are to pages of the appendix to the petition for writ of certiorari.

basis for many of the claims raised in this appeal were provided by Peterson and his counsel." Opinion, App. 3A.

Petitioner's petition for rehearing and suggestion for rehearing en banc were denied on February 17, 1993. App. 4A.

Petitioner's statement of the case presents a distorted and inaccurate account of the basic controversy heard by the arbitrators, the history of the arbitration proceeding, and the composition of the panel. A line-by-line correction of petitioner's statement of the case would be impossibly long, however, and would not assist the Court in reviewing the petition for writ of certiorari. Respondents will therefore attempt to address succinctly the deficiencies in petitioner's statement of the case.

In the section entitled "Basic controversy heard by the arbitrators," petitioner essentially reargues the merits of the arbitration. In exercising the extraordinarily narrow review accorded arbitration awards, a court does not review the merits but addresses whether the proceeding was "fundamentally unfair." *See, e.g.*, 9 U.S.C. §§ 10-11; *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020-22 (5th Cir. 1990). The merits of the controversy heard by the arbitrators were therefore not relevant to the issues decided by the courts below.[3] We suggest they have even less bearing on any issues of the kind we believe normally to be germane to the Court's inquiry into whether the petition for writ of certiorari presents important legal issues deserving this Court's consideration.

In the section entitled "History of the arbitration proceeding," petitioner falsely characterizes the record of the arbi-

[3] The court of appeals noted "as an aside that we have been unimpressed with the merits of the claims asserted in the arbitration proceeding." Opinion, App. 3A.

tration proceeding as demonstrating bias by the arbitrators and incorrectly asserts that the arbitration panel repeatedly expressed views favoring the broker's case, criticized petitioner for his trust of the broker, and repeatedly refused to accept settled principles of law. Respondents' briefs in the courts below addressed at length the record evidence refuting these assertions, and the district and circuit courts rejected petitioner's charges of evident partiality and manifest disregard for the law after reviewing the entire record of the proceeding. *See, e.g.,* Brief for Appellees, pp. 2-16, 29-30, 35-37. A detailed discussion of the evidence bearing on these points would not assist the Court in determining whether a writ of certiorari should be granted with respect to any legal issues.

The section in petitioner's statement of the case entitled "Composition of the panel" suffers from the same deficiencies as the previous two sections. Given petitioner's own provocations and the unorthodox presentation of his case, it is simply untrue that the arbitration panel displayed bias and unjudicial hostility. Petitioner failed to present any evidence that the NYSE violated its arbitration rules in replacing two arbitrators. Petitioner did not object to the two replacement panelists continuing with two days of hearing without having read transcripts for the previous nine days; he agreed, rather, that the hearing could resume after the two new panel members had become familiar with the controversy by hearing in largely narrative form testimony from the two principal witnesses. Further, petitioner's assertion that the arbitrators heard most of his case from a "cold transcript" and most of respondents' case from "live testimony" is flatly contradicted by the record. The record demonstrates that the new arbitrators were appointed on the tenth day of hearings and petitioner's case took 18 of 21 hearing days. During petitioner's case, the four witnesses who had testified before the appointment of the two new arbitrators were

called to repeat their testimony live before the new arbitrators.

ARGUMENT

THE COURT OF APPEALS CORRECTLY REFUSED TO VACATE THE ARBITRATION AWARD BASED ON FACTUAL FINDINGS THAT DO NOT PRESENT ISSUES OF LAW APPROPRIATE FOR REVIEW BY THIS COURT.

Petitioner asks the Court to review issues of law "apparently" decided by the court of appeals. He strains mightily to extract legal issues from the decision below because, in fact, the court of appeals' opinion does not discuss any legal issues. The court engaged rather in a fact-intensive analysis of the grounds for vacatur urged by petitioner and concluded that the record simply did not support those grounds. Because this Court does not review fact findings, the petition for writ of certiorari should be denied. The Court should deny petitioner's writ for the additional reason that the court of appeals' findings were correct.

Petitioner challenged the arbitration award in the court of appeals under § 10(b) and (c) of the Federal Arbitration Act, 9 U.S.C. § 10(b) and (c); under a court-made doctrine of doubtful validity known as "manifest disregard for the law;" and for violation of the due process clause of the Fourteenth Amendment to the United States Constitution. He charged arbitrator bias under 9 U.S.C. § 10(b) (authorizing vacatur for "evident partiality"), and argued that the circumstances surrounding the replacement of two arbitrators and continuation of the hearing constituted a refusal to hear evidence and deprived him of a fair hearing under 9 U.S.C. § 10(c) (authorizing vacatur for "refusing to hear evidence pertinent and material to the

controversy" and "other misbehavior by which the rights of any party have been prejudiced").

The court of appeals did not decide, as petitioner urges, that vacatur under § 10(b) is limited to instances where the arbitrators have a financial interest in the outcome or a special relationship with one of the parties. The court broadly rejected petitioner's charge of "evident partiality," holding that it was not convinced by petitioner's argument that the award should be set aside.

The record showed nothing more than an active panel in a hotly contested arbitration working hard to do its job in the face of repeated provocations by petitioner. *See e.g.,* 5R 336, 347-48; 11R 1711-13, 1719; 21R 4438 (petitioner directly addressed arbitrators in insulting tones, using expletives, and accused arbitrators of representing respondents). On rare occasion, an arbitrator may have reacted to petitioner's unprovoked — and often calculated — hostility, but the isolated comments petitioner plucked from a 5,422-page record did not establish "evident partiality." *See Fort Hill Builders, Inc. v. National Grange Mutual Insurance Co.,* 866 F.2d 11, 14 (1st Cir. 1989). The panel typically responded to petitioner's accusations by assuring him that they were not partial to either side and would decide the case fairly. (4R 291, 332, 358; 6R 314-15, 323-24; 13R 2306.) Their assiduous examination of the evidence throughout the hearing substantiated their commitment to rendering a fair award. *See* 17R 3318, 3343-62; 23R 4487-88, 4937-40.

Justice White, concurring in *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 150-52 (1968), observed that the Court in that case did not decide "that arbitrators are to be held to standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of

the marketplace, that they are effective in their adjudicatory function." The arbitrators in the present case labored hard as men of the marketplace to provide all parties a fair opportunity fully to present their evidence, and to evaluate the evidence as they received it. Although impeded in their efforts by petitioner's delays, procedural gambits, and provocations, they remained firmly committed to reaching a fair and just conclusion. The courts below were abundantly justified in rejecting petitioner's "evident partiality" argument.

The court of appeals also did not determine as a matter of law that the arbitration was not subject to the due process clause of the Fourteenth Amendment to the United States Constitution, as petitioner now argues. The Fifth Circuit concluded that the evidence did not support a due process violation, specifically finding that the fundamental fairness of the proceeding was not undermined by perceived "procedural irregularities."

Nor did the court of appeals decide, as petitioner argues, that as a matter of law it would not consider "manifest disregard of the law" as a ground for vacatur.[4] The court broadly rejected petitioner's contention that the award should be vacated on this ground and may very well have concluded as a factual matter that the "manifest disregard for the law" standard was not met on the record before it, even if it were a valid ground for vacatur. Nothing in the record established that the arbitrators acknowledged and then ignored substantive principles of law in fashioning their award. To the contrary, the record showed that the panel was very attentive to legal issues presented by petitioner's expert witness on the law and receptive to legal briefing. 20R

---

[4] This Court has never held that "manifest disregard for the law" is a valid ground for vacating an arbitration award. This concept was referred to in dicta in *Wilko v. Swan*, 346 U.S. 427, 436 (1953).

4167-68, 4224, 21R 4252-53, 4314. They properly reserved for their own judgment, however, the ultimate fact issues, and correctly observed that they were not bound by procedural or evidentiary rules of law. 20R 4085, 4119-22, 21R 4252.

Although the court of appeals noted "procedural irregularities" in the arbitration, it did not describe those irregularities in its opinion. Instead, it concluded that the fundamental fairness of the proceeding was not undermined and that "none are serious enough to warrant vacating the award." The Fifth Circuit did not conclude, as petitioner contends, that the NYSE appointed a replacement arbitrator in violation of NYSE arbitration rules. Nor did the court hold as a matter of law that an arbitrator appointed in violation of the parties' agreement may render a valid award, and the record does not support a conclusion one way or the other that the court so held.

The NYSE did not select replacement arbitrators under another set of arbitration rules contrary to the parties' agreement or appoint fewer arbitrators than specified in the agreement of the parties. Petitioner's reliance on *Avis Rental Car System, Inc. v. Garage Employees Union*, 791 F.2d 22 (5th Cir. 1986) and *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830 (11th Cir. 1991) is therefore misplaced. The parties agreed that the NYSE rules of arbitration would govern, and the NYSE replaced two arbitrators in the summer of 1990 under the NYSE rule then in effect governing replacement of arbitrators. *See* NYSE Rule 611, effective May 10, 1989, at Appendix 8A. Petitioner contends that he was improperly denied a peremptory challenge under his interpretation of NYSE Rule 609 (granting one peremptory challenge) and NYSE Rule 611 (making Rule 609 applicable to the selection of replacement arbitrators). The rules are ambiguous on their face concerning the application

of peremptory challenges in the circumstances presented by this case. Petitioner offered no evidence or legal support for his interpretation of the NYSE rules, and the record evidence demonstrated that the NYSE was consistently applying its rules concerning the resignation of arbitrators and appointment of replacement arbitrators. 25R 4-6. Thus, the circumstances of this case do not present a clear violation of the parties' agreement concerning the appointment of arbitrators. At the very most, the case involves a question concerning NYSE's interpretation of its rules governing the exercise of peremptory challenges to replacement arbitrators. Under well-established law, the NYSE has broad discretion in interpreting and applying its own rules. *See Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 940 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972). In any event, the interpretation of NYSE rules governing peremptory challenges for replacement arbitrators is not a legal issue of sufficient import that would merit the Court's review.

The court of appeals, moreover, correctly analyzed whether any "procedural irregularities" in the arbitration were serious enough to rise to the level of fundamental unfairness. Petitioner raised the issue of procedural irregularities in the context of 9 U.S.C. § 10(c), which by its terms compels analysis whether the alleged misbehavior prejudiced the rights of any parties. *See also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 & n. 10 (1987) (procedural aberrations under 9 U.S.C. § 10(c) must be in bad faith or so gross as to amount to affirmative misconduct). Even if appointment of a replacement arbitrator previously subject to petitioner's peremptory challenge was one of the "procedural irregularities" noted by the Fifth Circuit, the court properly determined that on the record the irregularity was not serious enough to warrant vacatur. Petitioner acknowledged that he had no challenge

for cause against the replacement arbitrator and could vocalize no complaint against him. 25R 12. The arbitration decision was unanimous, with all five arbitrators voting to dismiss petitioner's claim. Because three of the panelists, a majority, had been on the panel since the inception of the arbitration, petitioner could hardly argue that the replacement arbitrator determined the outcome of the arbitration. Even if that argument could be made, petitioner failed to adduce any evidence to support it.

The court of appeals properly rejected petitioner's arguments based on its review of the record under well-settled principles of law. The court recognized that it was not deciding any novel or important issues of law when it chose not to publish the opinion. Two federal courts have now reviewed the arbitration record, independently, and determined that petitioner's challenges lack merit. Petitioner nevertheless continues to pursue this costly and protracted litigation driven by unreasoning hostility toward arbitration and dissatisfaction with the award rendered by the panel. This case manifestly does not present a need for this Court to resolve any important issue of law. The Court has recognized that judicial intervention in arbitration must be severely limited lest arbitration lose its effectiveness as a speedy mechanism for resolving disputes. *See United Paperworkers,* 484 U.S. at 36-38. This case should now finally come to an end.

CONCLUSION

For all the above reasons, the petition for writ of certiorari should be denied.

MARVIN S. SLOMAN
Counsel of Record for Respondents
CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201
214/855-3000
Telecopier: 214/855-1333

Of Counsel:
BRUCE W. COLLINS
CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201
214/855-3000
Telecopier: 214/855-1333